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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 JOSE E. ROSAS,) Case No. SA CV 11-454-PJW
11 Plaintiff,)
12 v.) MEMORANDUM OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 COMMISSIONER OF THE)
15 SOCIAL SECURITY ADMINISTRATION,)
16 Defendant.)

17 I.

18 INTRODUCTION

19 Plaintiff appeals a decision by Defendant Social Security
20 Administration ("the Agency"), denying his application for
21 Supplemental Security Income ("SSI"). He claims that the
22 Administrative Law Judge ("ALJ") erred when he failed to consider all
23 of his impairments as well as his girlfriend's testimony. (Joint
24 Stip. at 2-43.) He also complains that the Appeals Council failed to
25 consider new and material evidence. (Joint Stip. at 43-45.) For the
26 reasons discussed below, the Agency's decision is reversed and the
27 case is remanded for further proceedings consistent with this opinion.
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II.

SUMMARY OF PROCEEDINGS

In April 2007, Plaintiff applied for SSI, alleging disability beginning March 2007, due to fatigue, memory loss, depression, an inability to concentrate, headaches, seizures, and neuropathy. (Administrative Record ("AR") 106-12, 118, 134.) The Agency denied the application initially and on reconsideration. Plaintiff then requested and was granted a hearing before an ALJ. (AR 88-90.) Plaintiff appeared with counsel and testified at the hearing on August 7, 2008. (AR 17-60.) The ALJ subsequently issued a decision denying benefits. (AR 10-15.) Plaintiff appealed to the Appeals Council, which denied review. (AR 1-4.) He then commenced this action.

III.

ANALYSIS

A. The ALJ's Failure to Address Plaintiff's Girlfriend's Testimony

Prior to the administrative hearing, Plaintiff's girlfriend, Margaret Salazar, submitted an eight-page questionnaire, detailing her observations of Plaintiff's difficulties. (AR 125-32.) She also testified at the administrative hearing about his condition. (AR 45-52.) Though the ALJ noted in passing that Salazar had testified, he never addressed why he was rejecting her testimony, which, clearly, he must have because he did not include any of her observations in the residual functional capacity assessment. (AR 14.)

Lay testimony is competent evidence and, therefore, an ALJ is required to consider it in determining if a claimant is disabled. See *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) ("Lay testimony as to a claimant's *symptoms* is competent evidence which the Secretary must take into account."). Failure to consider lay testimony

1 constitutes error. See *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
2 1050, 1054 (9th Cir. 2006). Further, the error mandates reversal
3 unless the Court can confidently conclude that no reasonable ALJ, when
4 fully crediting the testimony, could have found that the claimant was
5 disabled. *Id.* at 1056 ("[W]e hold that where the ALJ's error lies in
6 a failure to properly discuss competent lay testimony favorable to the
7 claimant, a reviewing court cannot consider the error harmless unless
8 it can confidently conclude that no reasonable ALJ, when fully
9 crediting the testimony, could have reached a different disability
10 determination.").

11 The Agency concedes that the ALJ erred in failing to address
12 Salazar's testimony but argues that the error was harmless because her
13 testimony was similar to Plaintiff's and the ALJ rejected his
14 testimony. (Joint Stip. at 5-6.) This argument is rejected for two
15 reasons. First, the test applied in evaluating the ALJ's failure to
16 address lay testimony is to credit the testimony and then determine if
17 any reasonable ALJ might have found Plaintiff disabled. *Stout*, 454
18 F.3d at 1056. Applying this test, it is clear that the error was not
19 harmless. If Salazar's testimony that Plaintiff suffered seizures,
20 had trouble concentrating, and had to regularly lie down due to pain
21 and discomfort was accepted as true, any reasonable ALJ would have
22 concluded that Plaintiff was unable to work, at least not at the jobs
23 identified by the ALJ. (AR 49-50, 57-58.)

24 The second reason the Agency's argument is rejected is because it
25 was not relied on by the ALJ in reaching his decision. Neither the
26 Court nor the Agency can comb through the record on appeal, looking
27 for reasons the ALJ could have relied on to reject the witness's
28 testimony but did not and superimpose them on the ALJ's decision.

1 See, e.g., *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) ("It
2 is error for the district court to affirm the ALJ's credibility
3 decision based on evidence that the ALJ did not discuss."). For these
4 same reasons, the Agency's argument that the Court should overlook
5 Salazar's testimony because it lacked foundation because, at the time
6 of the administrative hearing, she was not spending a lot of time with
7 Plaintiff (Joint Stip. at 5-6) is also rejected. So, too, is its
8 argument that her testimony was not material because it was cumulative
9 of Plaintiff's testimony. (Joint Stip. at 6.) Though the ALJ could
10 have rejected Salazar's testimony for these reasons, he did not. And
11 the Court will not affirm the ALJ's decision for reasons he did not
12 rely on. As such, the case is remanded to the Agency to for further
13 consideration of Salazar's testimony.

14 B. The Residual Functional Capacity Determination

15 Plaintiff argues that the ALJ did not include all of his
16 impairments in the residual functional capacity finding. (Joint Stip.
17 at 8-9.) He points out, for example, that the results of a nerve
18 conduction study were consistent with carpal tunnel syndrome, yet the
19 ALJ did not include a limitation for symptoms related to carpal tunnel
20 syndrome in the residual functional capacity finding. (Joint Stip. at
21 8.) Plaintiff notes that some of the doctors determined that he had
22 mental limitations but the ALJ did not include those limitations in
23 the residual functional capacity assessment, either. (Joint Stip. at
24 8-9.) For the following reasons, this claim is denied.

25 The ALJ was only required to include in the residual functional
26 capacity finding those impairments which he found were supported by
27 the evidence. *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir.
28 1989) (holding ALJ only required to include in hypothetical question

1 to vocational expert those limitations found to be supported by the
2 evidence). He did not find that Plaintiff suffered from carpal tunnel
3 syndrome and, therefore, was not required to include limitations
4 caused by carpal tunnel syndrome in his residual functional capacity
5 finding. The fact that test results were consistent with a finding of
6 carpal tunnel syndrome (AR 223) does not establish that Plaintiff
7 suffers from carpal tunnel. In fact, the doctor who performed that
8 test did not diagnose Plaintiff with carpal tunnel. (AR 223.) Nor
9 did any other doctor. (AR 238, 240, 561, 738, 754.) For these
10 reasons, the ALJ did not err in not including the alleged effects of
11 carpal tunnel syndrome in the residual functional capacity.

12 Plaintiff argues that the ALJ overlooked his mental impairments.
13 (Joint Stip. at 8-9.) He notes that examining psychologist Ahmed
14 Riahinejad found a "significant difference in IQ testing." (Joint
15 Stip. at 8.) He also points out that reviewing doctor Lydia Mallare
16 concluded that Plaintiff was moderately limited in his ability to
17 maintain concentration, persistence, and pace, which restricted him to
18 work involving simple, repetitive tasks. (Joint Stip. at 8-9.) For
19 the following reasons, the Court finds that these arguments are not
20 persuasive.

21 Dr. Riahinejad examined Plaintiff and performed various tests,
22 concluding that Plaintiff's overall IQ was 85 and that he could carry
23 out simple instructions. (AR 232-33.) Though the doctor noted that
24 the difference between Plaintiff's verbal IQ score of 98 and his
25 performance IQ score of 70 was significant, he attributed the
26 discrepancy to Plaintiff's vision problems, not to any cognitive
27 limitations. (AR 232-33.) Thus, the ALJ's reliance on Dr.
28 Riahinejad's opinion to conclude that Plaintiff did not have a severe

1 mental impairment and could perform his past relevant work (mostly
2 unskilled work) was not in error.

3 As to Plaintiff's argument that the ALJ should have accepted non-
4 examining doctor Lydia Mallare's opinion--that Plaintiff was
5 moderately limited in his ability to maintain concentration,
6 persistence, and pace and could only perform work involving simple,
7 repetitive tasks (AR 257, 259)--over examining Dr. Riahinejad's
8 opinion, again, the Court disagrees. The ALJ was tasked with
9 determining which doctor to rely on. He chose to rely on examining
10 doctor Riahinejad because Dr. Riahinejad had examined Plaintiff and
11 because his opinion was not contradicted by the treating doctors. (AR
12 14.) These are specific and legitimate reasons for accepting an
13 examining doctor's opinion over a non-examining doctor's opinion and,
14 therefore, the ALJ's decision will not be disturbed. See *Pitzer v.*
15 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) ("[T]he conclusion of
16 a non-examining physician is entitled to less weight than the
17 conclusion of an examining physician.")

18 Finally, Plaintiff argues that the ALJ overlooked his counsel's
19 argument that Plaintiff would be absent from work frequently and that
20 that would preclude him from holding down a job. (Joint Stip. at 9.)
21 But the evidence that Plaintiff would miss work frequently came from
22 Drs. Winkle and Mallare (AR 261, 563) and the ALJ discounted their
23 opinions. Thus, he was not required to consider Plaintiff's alleged
24 propensity for absenteeism in evaluating Plaintiff's ability to work.
25 See *Bayliss v. Barnhart*, 427 F.3d 1211, 1217-18 (9th Cir. 2005).¹

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28 ¹ The ALJ may need to reconsider the residual functional
capacity finding after addressing Ms. Salazar's testimony.

1 C. The Appeals Council's Consideration of the New Evidence

2 Following the ALJ's October 2008 decision denying his claim for
3 benefits, Plaintiff appealed to the Appeals Council, submitting
4 hundreds of pages of new records, which documented his medical
5 treatment both before and after the ALJ's decision. (AR 565-758.)
6 Most notably were records showing that, in July 2009, Plaintiff had
7 emergency heart surgery to repair blocked coronary arteries. (AR
8 738.) Despite these new records, the Appeals Council affirmed the
9 ALJ's decision. AR 1-4.)

10 Plaintiff argues that the Appeals Council failed to consider the
11 new records. (Joint Stip. at 43-44.) The record contradicts this
12 argument. The Appeals Council noted in its decision that it had
13 considered this evidence (AR 1, 4) and the Court accepts that
14 representation. Thus, this argument is rejected.

15 Plaintiff argues in the alternative that the Appeals Council
16 erred in not reversing the ALJ's decision based on this new evidence
17 because it shows that Plaintiff is severely impaired and incapable of
18 maintaining employment and suggests that he was disabled as of the
19 date of the ALJ's decision. He argues that, contrary to the Agency's
20 argument that the evidence goes to the period following the ALJ's
21 decision and is therefore irrelevant to assessing Plaintiff's
22 condition prior to the decision, it relates back to the pre-decision
23 period and exemplifies what Plaintiff was arguing throughout, that he
24 was incapable of working. (Joint Stip. at 45.)

25 The Court sides with the Agency, here. Though some of the
26 records relate to the period prior to the ALJ's decision and others,
27 though relating to the period after the ALJ's decision could be read
28 as circumstantial evidence about Plaintiff's condition before the

1 ALJ's decision, the records as a whole relate to a condition that was
2 not raised by Plaintiff or addressed by the ALJ, i.e., coronary heart
3 disease. Plaintiff never claimed before the ALJ that he was disabled
4 due to heart disease. He alleged disability based on fatigue, memory
5 loss, depression, an inability to concentrate, headaches, seizures,
6 and neuropathy. (AR 118, 134.) That is what he had been diagnosed
7 with and what he was being treated for. (AR 561.) Plaintiff's
8 emergency heart surgery nine months after the ALJ's decision was to
9 treat a different condition. Though, presumably, Plaintiff's coronary
10 heart disease was a progressive condition that was present to some
11 degree in October 2008, it was not the basis for his disability claim
12 and was not addressed by his counsel or the ALJ. As such, the Appeals
13 Council did not err when it determined that Plaintiff's emergency
14 heart surgery in July 2009 did not establish that the ALJ's October
15 2008 decision that Plaintiff was not disabled was erroneous. See,
16 e.g., *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001) (holding
17 district court did not err in refusing to remand case based on new
18 evidence where evidence was not "material" because it related to
19 condition that was not at issue before the ALJ).

1 IV.

2 CONCLUSION

3 For the reasons set forth above, the Agency's decision is
4 reversed and the case is remanded for further proceedings consistent
5 with this opinion.²

6 IT IS SO ORDERED.

7 DATED: March 20, 2012.

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10 PATRICK J. WALSH
11 UNITED STATES MAGISTRATE JUDGE
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26 ² The Court has considered Plaintiff's request that the case be
27 remanded for an award of benefits. That request is denied. It is not
28 clear from this record that Plaintiff is entitled to benefits and
further proceedings are necessary to resolve that issue.